IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL APPEAL No. 261 of 1999
With
CRIMINAL APPEAL No. 557 of 1999

For Approval and Signature:

HONOURABLE MR.JUSTICE ANIL R. DAVE
HONOURABLE MR.JUSTICE KS JHAVERI

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1 Whether Reporters of Local Papers may be allowed to see the judgment ?

2 To be referred to the Reporter or not ?

3 Whether their Lordships wish to see the fair copy of the judgment ?

4 Whether this case involves a substantial question of law as to the interpretation of the constitution of India, 1950 or any order made thereunder ?

5 Whether it is to be circulated to the civil judge ?

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YUSUFBHAI @ ISMAILBHAI JAFARBHAI SHAIKH - Appellant(s)
Versus
STAET OF GUJARAT - Opponent(s)

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Appearance :
MR BHARAT K DAVE for Appellant(s) : 1,
MR KT DAVE, APP for Opponent(s) : 1,

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CORAM : HONOURABLE MR.JUSTICE ANIL R. DAVE

and

HONOURABLE MR.JUSTICE KS JHAVERI

Date : 18/06/2007

ORAL JUDGMENT

(Per : HONOURABLE MR.JUSTICE ANIL R. DAVE)

1. In view of the fact that both these appeals have been filed challenging validity of the judgement and order passed by the Additional Sessions Judge, Ahmedabad (Rural) dated 3rd March, 1999 in Sessions Case No. 39/1998, these appeals have been heard and decided together.

2. Criminal Appeal No. 261/1999 has been filed by the convict, whereas Criminal Appeal no. 557/1999 has been filed by the State praying for enhancement of sentence awarded to the convict.

3. By virtue of the impugned judgement and order, the convict has been held guilty of committing offence under Section 498(A) of the Indian Penal Code and has been sentenced to undergo Rigorous Imprisonment for three years and a fine of Rs. 500/-, in default of payment of fine, one months Rigorous Imprisonment.

4. We have heard learned advocate Shri Bharat Dave appearing for the convict, and learned APP Shri K.T. Dave appearing for the State.

5. The facts before the Sessions Court, in a nutshell, were as under;

5.1. The appellant-convict (hereinafter referred to as “the appellant”), husband of the deceased Kausherben, had married the deceased somewhere in 1996. For some time, there were no problems in their married life but subsequently, their relations had become strained because the appellant started doubting character of his wife Kausherben. Because of the doubt, which the appellant had, he used to level allegations on Kausherben and very often he used to beat her also. Approximately six months before the date on which Kausherben committed suicide, she was driven out by the appellant from his house and, therefore, Kausherben had started staying with her mother, Jeenaben, P.W. No. 3, (Exh. 13) at Gandhinagar.

5.2. Two days prior to the date on which Kausherben had committed suicide i.e. on or about 24th July, 1998, the appellant had come to Gandhinagar and had met Kausherben at Gh-5 Road when Kausherben was returning from her place of work. At that time, the appellant had given threat to Kausherben that she should divorce the appellant and at a public place he had beaten Kausherben. As Kausherben was beaten in a public place, people had gathered and, therefore, the appellant had gone away.

5.3. Because of the aforestated mental and physical torture, and cruel treatment given to Kausherben, on 26th July, 1998 in Sector 24 of Gandhinagar at the residence of her mother, Kausherben, sprinkled

kerosene on her body and put herself ablaze and thereby she had committed suicide.

5.4. In the aforestated circumstances, criminal proceedings had been initiated against the appellant and charge had been framed on 10th December, 1998 (Exh. 5) against the appellant to the effect that he had committed offences under Sections 498(A) and 306 of the Indian Penal Code.

6. In the course of the trial, learned Sessions Judge had considered evidence of the following important witnesses.

(1) Dr. Chandrakant Tanna, P.W. No. 1, (Exh. 9)
(2) Habibmia Shaikh, Maternal Uncle of the deceased, P.W. No. 2, (Exh. 12)
(3) Jeenaben Shaikh, mother of the deceased, P.W. No. 3, (Exh. 13)
(4) Dr. Natwarlal Thakker, P.W. No. 5, (Exh. 20)
(5) Dr. Dilipkumar Jogia, P.W. No. 6, (Exh. 22)
(6) Jayshreeben Shah, Dy. Mamlatdar and Executive Magistrate who had recorded dying declaration, P.W. No. 7, (Exh. 23)
(7) Pathubhai Chaudhry, School teacher, P.W. No. 8, (Exh. 26)
(8) Khodubha Dolatsingh, Duty Head Constable, P.W. No. 9, (Exh. 28)
(9) Dalpatsingh Rathod, Police Sub Inspector, P.W. No. 11, (Exh. 32)
(10) Mangalsingh Waghela, Investigating Officer, P.W.

No. 12, (Exh. 38)

(11)other witnesses like panch witness were also examined

7. The following documentary evidence had also been considered by the Sessions Court;

(1) Charge, (Exh. 5)
(2) Post-mortem Note, (Exh. 11)
(3) Suicide Note, (Exh. 14)
(3) Inquest Panchnama, (Exh. 15)
(4) Medical case papers, (Exh. 21)
(5) Dying Declaration, (Exh. 25)
(6) Report of Forensic Science Laboratory, (Exh. 36)
(7) FIR (Exh. 40)

8. In the course of the trial, the Sessions Court had examined Dr. Dilipkumar Jogia, P.W. No. 6, (Exh. 22), who had examined Kausherben when she was admitted to hospital as an indoor patient. The said witness had stated that Kausherben was conscious when she was brought to the hospital.

9. The Sessions Court had also examined Jayshriben Shah, P.W. No. 7 (Exh. 23), Deputy Mamlatdar and Executive Magistrate who had recorded the dying declaration (Exh. 25). The said witness had stated that at the time when the dying declaration was recorded, Kausherben was conscious and she had recorded whatever had been stated by Kausherben. Nobody was present, except herself, at the time when

the dying declaration had been recorded.

10. Upon perusal of the dying declaration (Exh. 25), it is found that, according to Kausherben, two or three days before the date on which she had committed suicide, the appellant had gone to Gandhinagar and had met Kausherben. The appellant had asked for divorce under threat to her and had also beaten her. Because of the said incident, she was mentally very upset and due to the said reason, she had put herself ablaze. Persons residing in the vicinity had come and had put out the fire and she was taken to the hospital.

11. Mother of Kausherben, Jeenabeen, P.W. No. 3 (Exh. 13) was also examined by the Sessions Court. In her deposition, she had stated that Kausherben was not having any problem earlier but when she came to her place for the third time, Kausherben had stated that the appellant, her husband, had doubt with regard to her character and therefore he used to beat her. She had further stated that the appellant used to torture her and, therefore, Kausherben had shifted to her place at Gandhinagar. She had further stated that when the appellant had come to Gandhinagar and had asked Kausherben to divorce him, the appellant had also beaten her in public place and the said fact had been revealed by Kausherben to her. When Jeenaben, P.W. No. 3 (Exh. 13) had visited Kausherben in the hospital, Kausherben was conscious and she had told her that she had given all details in the FIR

and, therefore, she need not say anything further. She had also stated that the appellant had beaten her at Gh-5 road and because of the said fact she had put herself ablaze. She had also stated that Kausherben had studied up to standard II and the suicide note was in her own handwriting. Of course, in the cross examination she had admitted the fact that before the police authorities she had never stated that the suicide note was in the handwriting of Kausherben. She had admitted that Kausherben was illiterate and she had also not told to the police that Kausherben had studied up to Standard II.

12. Dr. Natwarlal Thakker P.W. No. 5, (Exh. 20) was also examined by the Sessions Court. The said doctor had stated that he had treated Kausherben and had given necessary antibiotics and analgesic drugs to her. He had also stated that no narcotic drugs were given to her and Kausherben was conscious while in the hospital.

13. Similarly, Dr. Dilipkumar Jogia, P.W. No. 6 (Exh. 22) was examined. He had stated that Kausherben was conscious and, therefore, the said fact was noted by him in the case papers and he had put his signature below the note put by him.

14. The appellant had pleaded not guilty and at the end of the trial after considering the evidence, the Sessions Court had convicted him for commission of offence under Section 498(A) of the Indian Penal

Code.

15. Learned advocate Shri Bharat Dave appearing for the appellant has mainly submitted that on the dying declaration there is no endorsement by any medical officer to the effect that Kausherben was conscious and, therefore, the said dying declaration should not have been taken into consideration.

16. Thereafter, he has submitted that Habibmiya, P.W. No. 2 (Exh. 12), uncle of Kausherben, who had brought her to the hospital, did not file the FIR (Exh. 40). According to him, in the normal circumstances, FIR ought to have been filed by him in the normal circumstances but in the instant case it was filed by Kausherben herself. The said FIR should not have been taken at face value because according to him, when Habibmiya, P.W. No. 2, (Exh. 12) had brought Kausherben to the hospital, FIR should have been filed by him.

17. He has further submitted that the evidence of close relatives was only recorded by the Sessions Court and no independent witnesses were examined so as know whether in fact there was any cruelty on the part of the appellant. He has therefore submitted that the Sessions Court has committed an error in coming to the conclusion that the appellant is guilty of the offence alleged to have been committed by him. In support of his submissions, he has relied upon the judgements delivered in the case of **STATE OF GUJARAT**

Vs BHARATBHAI BALUBHAI LAD & ORS, 2006(1) 47(1) GLR 514 and in the case of **INDRASING M. RAOL Vs STATE OF GUJARAT, 1999(3) 40(3) GLR 2536**.

18. He has therefore submitted that the order of conviction as well as the appeal filed by the State for enhancement of sentence should be quashed and set aside.

19. On the other hand, learned APP Shri K.T. Dave has not only made an effort to support the judgement but has also submitted that the punishment should be enhanced. Looking to the facts of the case, he has submitted that in fact the appellant should be held guilty of the offence under Section 306 of the Indian Penal Code because, only on account of cruelty of the appellant, Kausherben had committed suicide.

20. We have heard the learned advocates at length and have also gone through the record and proceedings pertaining to the case. We do not find any substance in the submissions made by learned advocate Shri Bharat Dave appearing for the appellant. We also do not find substance in the argument advanced by the learned APP to the effect that the appellant should be held guilty under Section 306 of the Indian penal Code. So far as the endorsement of the doctor with regard to consciousness of Kausherben is concerned, in our opinion, looking to the record, the Sessions Court has rightly come to the conclusion that Kausherben was throughout conscious. The evidence

adduced by Dr. Natwarlal Thakker denotes that she was conscious at the time when she was brought to the hospital.

21. Moreover, Kausherben was examined by Dr. Dilipkumar Jogia, P.W. No. 6, (Exh. 22) subsequently and even he had noted that she was conscious. Second endorsement was made on the case paper at 5:30 p.m. on 26th July, 1998 by Dr. Dilipkumar Jogia, P.W. NO. 6, (Exh. 22) that Kausherben was conscious at that time. Even Dr. Chandrakant Tanna , P.W. No. 1, (Exh. 9) had made an endorsement that Kausherben was conscious when she was admitted to the hospital. Even Jayshriben Shah, P.W. No. 7 (Exh. 23), Deputy Mamlatdar and Executive Magistrate who had recorded the dying declaration has also stated that at 4:30 p.m. Kausherben was conscious and at that time, her dying declaration was recorded. Looking to the said facts, it can be believed that Kausherben was conscious when her dying declaration was recorded.

22. So far as filing of FIR is concerned, in our opinion, the submission of the learned advocate that Habibmiya Shaikh , P.W. No. 2 (Exh. 12) should have filed the FIR as he had brought Kausherben, does not appear to be of much substance. Habibmiya Shaikh, P.W. No. 2, (Exh. 12) was the only relative who was present in the hospital when he had brought her niece to the hospital. Looking to the circumstances, in our opinion, he would have preferred to remain with his niece rather than going to police station

because, as an Uncle, his priority would be to look after his niece rather than to go to the police for filing an FIR. Ultimately, FIR was filed by Kausherben, and we do not find any reason to believe that the FIR was false or delayed simply because Habibmiya Shaikh, P.W. NO. 2 (Exh. 12), who had brought Kausherben to the hospital did not file the FIR.

23. The Sessions Court has examined the mother and the maternal uncle of the deceased, Kausherben. They are the persons who could have known something about the personal life of Kausherben. Possibly, their relatives could not have said anything about the torture given to Kausherben by the appellant. Both the witnesses, namely, Habibmiya Shaikh, P.W. No. 2(Exh. 12), Uncle of Kausherben and Jeenaben, P.W. No. 3 (Exh. 13), mother of the deceased Kausherben, appear to be truthful. There is no reason to disbelieve them and, therefore, in our opinion, the Sessions Court was justified in considering and believing deposition of those witnesses.

24. So far as the judgements cited by the learned advocate appearing for the appellant are concerned, in our opinion, the said judgements would not help him. So far as **STATE OF GUJARAT Vs BHARATBHAI BHALUBHAI LAD & ORS** (Supra) is concerned, it pertains to conviction under Section 306. In the instant case, the appellant has not been convicted for

commission of an offence under Section 306 and, therefore, in our opinion, the said judgement would not help him. There is ample evidence in the instant case to indicate that the appellant had beaten Kausherben about two days prior to her committing suicide. Thus, in our opinion, the appellant had acted in a cruel manner and, therefore, the Sessions Court has rightly held that he is guilty of an offence under Section 498(A) of the Indian Penal Code. So far as the judgement delivered in **INDRASING M. RAOL Vs STATE OF GUJARAT** (Supra) is concerned, in our opinion, the said judgement would also not help the appellant for the reason that this is not a case where only one incident with regard to beating had taken place. Only because of continuous mental torture and beating, Kausherben had left her husband's place and shifted to her mother's place. Again, possibly, when she was living peacefully, the appellant went to Gandhinagar and at a public place Kausherben was humiliated and beaten by him. Thus, there is sufficient evidence with regard to harrassment and cruelty. The Sessions Court has rightly come to the conclusion that the appellant is guilty of the offence punishable under Section 498(A) of the Indian Penal Code.

25. The appeal filed by the State for enhancement of sentence also deserves to be dismissed because no offence under Section 306 of the Indian Penal Code has been established against the appellant and we would not like to interfere with the findings given

by the Sessions Court. In our opinion, the evidence has been correctly appreciated by the Sessions Court and the Sessions Court has rightly come to the conclusion that the appellant was guilty only of an offence under Section 498(A) of the Indian Penal Code.

26. In the aforestated circumstances, Criminal Appeal No. 261/1999 is dismissed. The judgement and order dated 3rd March, 1999 passed by the learned Additional Sessions Judge, Ahmedabad (Rural) at Gandhinagar in Sessions Case No. 39/1998 is confirmed. Bail Bond stands cancelled. Yusufbhai @ Ismailbhai Jafarbhai Shaikh, the appellant-accused, shall surrender within five weeks from today.

27. As the case is made out for enhancement of sentence, Criminal Appeal No. 557/1999 is also dismissed.

Record and Proceedings to be returned to the trial Court.

(ANIL R. DAVE, J.)(K.S. JHAVERI, J.)

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